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TAKING CARE OF THE BUSINESS OF THE LAWYER WHO HAS GONE TO WAR.

Local bar associations are doing commendable work in urging lawyers who stay at home to take care of the business of lawyers who go to the front.

Reports from different sections of the country indicate that this idea is more than a patriotic sentiment. It has taken definite shape in many places. One bar association has written every member of the bar asking their consent to handle certain parts of the practice of enlisted and commissioned practitioners that may be assigned to them and to forward the entire fee to the client's former attorney and also pledging themselves not to accept any business from any such client after the return of his former attorney to regular practice.

This is idealism put into practice and is worthy of the greatest profession on earth. It reflects credit on the practice of the law and has confirmed the definite increase in the prestige of lawyers which followed upon the unselfish services rendered by the entire bar of the country to the young men eligible to draft in preparing their questionnaires.

Such splendid self sacrifice on the part of the lawyers of the army makes us feel like holding our heads a little higher and congratulating ourselves on the fact that the finer instincts of the profession we love are still actuating members of the bar and that virus of commercialism has not destroyed the higher ideals of the profession.

A. H. R.

RIGHT OF LABOR UNION TO PRESCRIBE MINIMUM NUMBER OF EMPLOYES IN A BUSINESS OR ENTERPRISE.

In a Massachusetts case the question is propounded: "Is a combination between musicians a legal one by which a plaintiff is compelled to employ a number of musicians specified by the members of the combination, if he wishes to employ any member of the combination, even though it be the fact that in the plaintiff's opinion the employment of a single musician is the most advantageous way of conducting his business and that the employment of more than one musician will cause him pecuniary loss?" Haverhill Strand Theater v. Gillen, 118 N. E. 671, decided by Massachusetts Supreme Judicial Court.

The court in treating this question concedes that a labor union is a lawful combination and may resort to a strike to enforce lawful rules to accomplish its purposes. For example, the court had committed itself to the proposition that a labor union of masons had the right to strike to enforce its demands to secure the work of pointing mortar where members of the union had laid bricks for a building. Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638.

That case is described as one where "the defendants combined for the purpose of getting work which the employer wanted done," while in the case before the court, the union was seeking to force an employer to employ men for work he had no desire to have done, and when paying therefor would work a pecuniary loss. It asks whether the latter demand "is a justifiable interference with the plaintiff's right to a free flow of labor?"

The distinction stated appears quite narrow, but its consequences are said to be "far reaching." It is said that: "If it is legal for musicians to adopt a minimum rule fixing the number of musicians who shall be employed in all the theaters in its

jurisdiction, it is hard to see why a minimum rule may not be adopted by the allied trade unions of masons, carpenters and plumbers, fixing the number of stories of which every store to be erected in the busines district is to consist, that is to say, masons, carpenters and plumbers may combine to refuse to work on any store less than ten stories in height even though the owner of land wishes to erect a store of two stories only, and even though the owner in his judgment cannot without pecuniary loss erect one having more than two stories." The court proceeds to give other illustrations of similar purport, in the effort to prove there could arise a virtual control by labor unions where wide activities need labor in their prosecution.

The court concludes that a majority of the court are of opinion that the minimum rule sought to be enforced was an interference with the right of employers to a free flow of labor not justified by the purpose for which the rule was made. The court rejects a Minnesota case to the contrary which case went upon the theory that what a man may do singly any number of men may do jointly, which it declares not to be the law in Massachusetts.

We think criticism of the principle in the Minnesota case is just, as appears lately to have been held by U. S. Supreme Court. Hitchman Coal & Coke Co. v. Mitchell, 38 Sup. Ct. 65. There it was said: "The right of employees to strike would not give defendants the right to instigate a strike. The difference is fundamental."

Neither does the fact that carrying on a strike is peaceable make it, as matter of law, lawful, as the Mitchell case also holds.

It seems to be a question of a degree how far rules adopted by a lawful combination, as is a labor union, may be enforced. If they have the necessary effect to violate legal rights of others, as if their tendency is to create an unlawful monopoly, a combination, however lawful which may be in the protection of a labor union's right to advance its own interests, may be, it will be held to be the employment of means to an unlawful end. Police power protecting such a rule would seem quite one-sided in its application and the struggle for private advantage would become ruthless in its disregard of ordinary rights and privileges.

NOTES OF IMPORTANT DECISIONS.

MUNICIPAL CORPORATIONS — ORDINANCE FIXING RATES FOR PUBLIC UTILITY NOT CONTRACT FREE FROM IMPAIRMENT.—In Collingwood Sewerage Co. v. Borough of Collingswood, 102 Atl. 901, decided by Supreme Court of New Jersey, it was held that where an incorporating act for a public utility provided for a borough granting a consent ordinance fixing maximum and minimum rates for service, this ordinance and its acceptance did not create a contract for rates within those limits so as to be free from impairment of contract obligation, and therefore rate fixing for the utility came under the control of the state's Public Utility Commission.

The court said: "The ordinance was the legislative act of the municipality. As a legislative act, it was subject to the control of the legislature itself, and that body could make changes as long as it did not infringe the rights of the sewerage company, arising under the ordinance. It makes little difference whether we say that the ordinance created by way of legislative grant a property right called a franchise, protected by the Fourteenth Amendment, or a contract protected by the contract clause of the Federal Constitution and under our state constitution. In either case, the question is whether a municipal corporation, an agency of the state, is protected by either the Fourteenth Amendment or the contract clause. It is well settled that such protection does not extend to the rights of the municipal corporation against it own creator."

This principle being settled, as said, the court spoke of such an ordinance as being "a grant upon condition rather than a contract. It creates public duties which can be enforced by mandamus." Being such there was held to be no reasen "why the legislature may not clothe a public service commission," with the power it had formerly reposed in the municipality. For discussion of this subject see

Collier on Public Service Companies, 1918, §§ 91, 92.

The instant case was later confirmed by Supreme Court of New Jersey in Northampton, E. & W. T. Co. v. Board of P. U. Comrs., 102 Atl. 930, where consent of Public Utility Commission was sought by a street railway company to increase its fares and resistance was interposed on the ground that there was an irrepealable contract in favor of the municipalities through which the railway ran. The order of the commissioners refusing to entertain the application was set aside.

BENEFIT SOCIETY—CLAUSE FOR COMPENSATION FOR INJURY ACCORDING TO SYSTEMATIC BENEVOLENCE OF SOCIETY.—In Miller v. Grand Lodge, Brotherhood Railroad Trainmen, 118 N. E. 713, decided by Supreme Court of Illinois, it is held that where one section of the constitution and by-laws of a fraternal association provided for recovery for enumerated injuries and for other injuries another section provided that application is to be addressed to the systematic benevolence of the association through its beneficiary board, but in no event shall claim therefor "be made the basis of any legal liability" of the association, this other section was held contrary to public policy, as giving to one party to a contract to be both "judge and arbitrator of its own case." Therefore a suit for other injuries was cognizable by the courts, and an award for compensation was affirmed.

The court concedes that the former section, if it stood alone, would have precluded any recovery, but it strongly inveighs against the other as providing for charity in satisfying a legal right. All through the contract of insurance is admitted to be governed, not solely by the policy or benefit certificate, but by the constitution and by-laws.

But what are a constitution and by-laws of a society of this sort? And what powers has a corporate organization governed by such constitution and by-laws? Plainly it seems to us it has no real contractual existence, so far as agreements with members are concerned. Members so understand when they put limitations on the corporation in its right to contract with them. If two individuals make a contract by which in a certain event one is to become liable to the other for specified injury, and for injury suffered otherwise, the latter may give him anything or nothing as he may out of sympathy see fit, why is not such a contract lawful? If it is, why may not an aggregation of individuals, speaking by its solemn agreement, provide for the same thing? Certainly one joining an order either before or after such a provision is made, accepts or enters into a contract as between individuals.

It does not seem precisely right to take away from a corporation all right to contract outside of certain limitations and then hold it as if it were clothed with a general right of contract.

CORPORATIONS—RIGHT OF ONE ALSO STOCKHOLDER IN RIVAL CONCERN, TO INVESTIGATE BOOKS.—In Furst v. W. T. Raleigh Medical Co., 118 N. E. 763, decided by Supreme Court of Illinois, it is held that the fact that a stockholder is also a holder of stock in a competing corporation and displays a hostile attitude to it and by examination into its books may obtain information of benefit to the competing company, does not deprive him of his statutory right to examine its books.

It appears that the statutory right conferred is as to records and books of account kept at its principal office, but it was alleged by the corporation, that the exercise of the right granted by statute would enable the applicant to discover its customers and to obtain knowledge of its secret processes in compounding medicines. The examination sought by him was ordered by the Appellate Court so as to exempt from its operation salesmen's registers and formulas and secret processes, and this ruling on further appeal by the corporation was affirmed.

This restriction of the order for examination seems entirely just, but should it appear that the examination would lead to disclosure of "secret formulas and business matters," further hope is held out for application for relief.

While the court appears to have correctly ruled this case, it yet appears that there may be a serious handicap in the conduct of corporate business beyond what might exist as to a partnership or individually owned business. If stockholders in their entirety own a business, in ultimate aspect, they are entitled to know all about it, its list of customers, its methods of doing business, its formulas, secret or open, just as much as are its directors or managers. But is the fact, that stock may be sold on the open market or come into ownership of others by descent or distribution an implied limitation on their rights as ultimate owners?

It is well settled in law, that the owner of a business has rights in legitimate secrecy and

to keep for his own advantage that which he has built up in the course of business. If he has to expose these things to others they may lose greatly their value, or even be made valueless. What restriction, if any, may be placed on stockholders, prying into this secrecy? Is there not a limitation on rights of ultimate ownership in the fact that it is ultimate and that as long as a corporation is a going concern, the methods and processes it uses belong rather to the corporation as such? This must be true, or action by one of the ultimate owners might be taken regardless of its injury to other ultimate owners.

This statute was, we think, properly regarded by the Illinois courts, which seemed to confine the exercise of the right granted to narrow terms.

RECALL OF JUDGES AND IMPEACHMENT.

In the Central Law Journal of December 14, 1917, is an interesting article by Mr. Albert M. Kales, relating to the selection of judges, which deserves some attention. To a practicing attorney it has often been mortifying to observe that a judge, who is honest and capable, and who renders excellent service between ordinary litigants, fails in moral courage when some public question affecting a large number of the electorate comes before him. Nearly everyone has had such experience, especially where the judge has to submit to a popular vote every few years in order to continue in office.

One does not feel like condemning the judge for his lack of moral stamina, for we realize that it is the system, which, like conscience "does make cowards of us all."

Mr. Kales asserts "that there is practically no such thing as the selection of judges by the people." It is difficult to perceive the correctness of this statement. Every state has its peculiar system, such as appointment by the executive, or by the legislature; but, when the people make their choice directly at the polls, it surely comes close to electing judges by direct ballot.

As an illustration, take the state of Washington; any attorney of record may become a candidate for a judicial office by filing a declaration of candidacy with the proper officer at least thirty days before the primary election, and paying into the public treasury a fee equal to one per cent of the annual salary. For instance a candidate for Superior Court Judge in Seattle would pay $40.00, while an aspirant for Supreme Court honors is required to deposit $60.00.[1] The name of everyone who has filed as provided by law appears on the primary ballot, and all have an even chance. If there are four offices to be filled, and there should be ten candidates, then only the names of the eight candidates having the highest number of votes will appear upon the general election ballot; however, if any judicial candidate receives a majority of all the primary votes cast, then his name is printed "separately on the general election ballot," and no name is placed opposite his, only a blank space is left for a name to be written in. That is, the candidate having a majority of all the votes cast at the primary is virtually elected, although his name must appear upon the official ballot for the general election. If this is not an election of judges by direct vote of the people, what is it? Known as the "Nonpartisan Judiciary Election," this scheme has worked fairly well. In fact, the electors as a rule have been discriminating and careful in voting for judges. At any rate, a person notoriously incompetent or unfit for a judicial office would have but a slim chance, especially if the bar should voice a strong and determined opposition to such a candidate.

Some candidates have not scrupled to resort to advertising their peculiar fitness and merits. One ambitious attorney wanted to be judge upon the ground, that if elected, he would "enforce the laws of God and

(1) Sec. 4808-4892 Remington's 1915 Code.

man without fear or favor." Presumably, he was under the impression that it would be his duty to administer ecclesiastical law as well as the common, and statute law. Another offered "to give a poor man an equal chance with the rich man." It is to the credit of the voters that these specious appeals met with well deserved rebuke.

Members of the bar often refer to the federal system of appointment as the acme of perfection. This plan has been quite successful, but it is far from ideal. It is a notorious fact that the people generally distrust the disinterestedness of lawyers; they have no confidence in any altruism of the bar. The English method of appointing judges has been abandoned in this country where the public have had their way. An elective judiciary is what the people want under the prevailing system, and as they have to pay the bill and suffer the consequences, they are entitled to get what they want. There would be less objection to appointed judges if there were a reasonably speedy and inexpensive method to get rid of an incompetent or inefficient judge; but the prevailing practice of impeachment by a legislature or by Congress is impracticable and archaic; what is worse, it is wholly discredited by the public. Because of this, generally speaking, the popular demand is for the election of judges.

However, a plan that would be likely to meet with general approval and eliminate much criticism and distrust of our judiciary, and that is evidently superior to the existing system, would be something on the following order:

Judges should be elected by popular vote for an arbitrary term—say, four years. If he is directly re-elected to the same office, he should then hold during life, or until he resigns or is removed. Four years' service should be long enough for a test of competency and fitness for judicial work. The vice of the elective system is, that judges have to bear continually in mind that they must submit to periodic elections with their incidental expense and distraction from work. Having demonstrated his competency and fitness, if the voters honor him with a re-election, that should place him permanently on the bench. This would almost entirely eliminate political trimming and favoritism, and dispense with "playing politics" while in office.

To illustrate this point: One is reminded of a story told by Daniel Webster. Jeremiah Mason, his great rival at the bar, objected to a candidate for a judgeship. Webster wanted to know the reason; Mason answered: "If that man were elected he would have to do double work—first, to determine the right of the case according to law; second, to make up his mind which way the case should be decided according to politics."

The electors would be satisfied with the proposed scheme if there were a remedy available to every citizen by which the judicial incumbent could be speedily ousted from office in the event that he should neglect his duties, fail mentally or physically, or be guilty of some act impairing his usefulness, or that would cause his integrity to be suspected.

Impeachment of a federal judge is a slow process, enormously expensive and is finally to be determined by partisan votes, irrespective of the legal aspects or merits of the charges. The Hayes-Tilden Electoral Commission, although composed of judges who wore the ermine unsullied, is a fair illustration of how politics influences non-judicial bodies. This commission decided for Hayes by a strictly partisan vote.[2]

In a western state some years ago a judge was required to answer to charges of improper official conduct. Impeachment proceedings failed, not because he was deemed innocent, but because sufficient votes had been purchased at $500.00 each to obtain a majority in his favor.

The objection to the federal system is mostly based on the fact that it is well-nigh

(2) Decisive Battles of the Law 224.

impossible to dispense with the services of a judge who is naturally not adapted for the office, or who by reason of some act or infirmity of mind or body becomes unfit for service on the bench. If he will not resign he can be removed only "on impeachment for, and conviction of treason, bribery, or other high crimes or misdemeanors."[3] There have been occasions when judges have held office long after their infirmities unfitted them for their duties, but as "few die and none resign," there was no relief until a kind Providence came to the rescue. They had not committed a crime by growing old in service, nor by suffering decay of their faculties; therefore, they had a right to stay *ad libitum*.

When the Constitution was adopted this was urged as an objection. Hamilton, usually clear and forcible, answered feebly, saying: "All considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose."[4]

The several states have usually adopted or followed the federal procedure of impeachment, and so it has become established as an essential part of our political system, but it does not follow because it is ancient that nothing better can be devised or substituted. Anyone who does not admit unqualified perfection is, of course, by some regarded as an iconoclast or worse. That the Constitution is not perfect is conclusively shown by the numerous amendments, and the probability that the next few years will witness several more, and perhaps extremely radical changes.

Fancy a lawyer of the old, strict, construction school dreaming a third of a century ago about extending the Constitution to unheard of dimensions, his dream would in reality now be outdone by the scope and extension of powers which the federal government has assumed as a right without question.

It is almost incredible that Matthew H. Carpenter, the greatest constitutional lawyer of his day, should have asked this question of Senator Windom in the United States Senate in 1879: "Is there a lawyer in the Senate who can point out what clause of the Constitution affords power to establish a Department of Commerce and Agriculture?"[5]

In the study of comparative jurisprudence in relation to the judiciary, the proposed scheme recommends itself in place of impeachment and is far superior to it, because of simplicity and directness; the proceedings would be before a judicial body and not before a congregation of politicians unadapted for such duties. The expense would be comparatively small, action would be speedy and not delayed as in the case where the legislatures meet only biennially.

The direct, simple and effective method to be substituted would be a Court of Impeachment, called into existence by order of the executive whenever charges requiring investigation against any judicial officer may be presented to him. The President or Governor would submit such charges to the Chief Justice and direct him to hold a special court, and designate, for instance, two additional Supreme Court judges and four judges from the inferior courts to serve with him. This high tribunal of seven would hear and determine the charges preferred, and should have unlimited power to remove, suspend or discipline or do whatever they might deem advisable. They should also have authority to grant a pension to the judge removed not exceeding two-thirds the salary of his office. When the cause is determined this special tribunal would cease to exist and pass from memory as a jury.

This method prevails in some countries and has proven satisfactory in practice. If a similar plan were adopted in lieu of our

(3) Sec. 4. Art. 11 Constitution.
(4) The Federalist, LXXIX.
(5) Flower's Life of Carpenter, p. 429.

present impeachment, it would be of little concern to the public whether the judiciary were elected or appointed. In the eighteenth century judges were mostly appointed; but the newer states have always adopted election by popular vote. Had there been provided a certain, simple, convenient, inexpensive way to remove and supersede judges when they became unfit or incompetent for service on the bench, without proving them to be criminals, it is likely that judges would generally be appointed by the executive instead of being elected by popular vote as an ordinary politician.

It, therefore, follows: that it is not of as much importance how men attain to a judicial office, as it is for the people to have the power to discipline, suspend or remove from office any incumbent who becomes unfit, unworthy or incompetent by reason of neglect of duty, age, infirmity or through malfeasance or misfeasance, to hold the high, dignified and distinguished office of judge.

The movement for the recall of judges is largely based on dissatisfaction with the present system of impeachment. The American Bar Association appointed a committee for the purpose of opposing judicial recall and the recall of judges. It seems strange that this distinguished body of lawyers should have acted injudiciously in disposing of this very important question. The committee was to oppose and defeat the demand for recall in all its phases; apparently it was taken for granted that there was no other side to this proposition and that there could be no possible remedy devised to remove existing evils or to satisfy the reasons advanced for a recall.[6]

This point is made clear by Ostrogorski, the eminent historian on Democracy, thus: "Resistance to an idea, pure and simple, is never a force in itself; to proclaim one's hostility to an idea, without being able to meet it on equal terms, only gives it a fresh stimulus."

(6) Report of American Bar Association for 1913, p. 62.

Surely, it would have been more logical to have ascertained why there was a popular demand for recall and to have endeavored to remove the cause, than to suppress the recall movement arbitrarily. The writer is opposed to the recall of judges and, generally speaking, the entire bar is opposed to it; but like Banquo's ghost it will not down, and probably will trouble us again when normal conditions are restored.

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LIFE INSURANCE FOR THE BENEFIT OF WIFE OR CHILDREN—CASE OF ARNOLD v. DOMINION TRUST COMPANY.

The general rule in the United States is that a policy of insurance on the husband's life in favor of the wife becomes her separate property, and statutes have been passed in various states regulating this matter.

In Canada the same matter has been dealt with, and acts have been passed by the different provinces for the purpose, as expressed in these acts, of "securing to wives and children the benefit of life insurance." Cases arising under these acts have been before the Canadian courts on several occasions, especially in the Province of Ontario, and the rules laid down by the courts will repay a careful perusal by American readers who may be interested in the subject.

The general effect of these Canadian acts is that any person may not only insure his life for the benefit of wife or children, but that, after a policy has been placed which is not for their benefit, he may, by any writing identifying the insurance policy by its number or otherwise, declare and provide that the policy shall be a trust for the benefit of wife or children, free from the control of his creditors.

One of the first questions which the Canadian courts were called on to decide was this—if a person has a life insurance policy, and by a will, bequeaths the proceeds of the policy to a wife or children, is the will a "writing" within the meaning of the law?

This point has been before the Ontario courts in three or four cases, in all of which it has been decided that such a declaration may be made by a will.

As to what is a sufficient "identification" of the policy "by number or otherwise," there has been more uncertainty, but in one Ontario case it was held that where a party bequeaths the proceeds "of all life insurance policies" to the wife or children, or where he makes certain bequests and then bequeaths the residue of his estate, "including life insurance," to wife or children, it is a sufficient "identification" of the policy to comply with the terms of the law.

In another Ontario case a party made a will bequeathing the sum of $1,000 "to be paid out of the insurance money on my life at my decease," and there was only one policy of insurance on his life, either at the time the will was made or thereafter, and the question was whether this was a sufficient identification of the policy. The Ontario court held that it was.

"The wording here is certainly very general," said the judge who decided the case: "but, the fact being admitted that the policy in question existed at the time, and was the only policy of insurance upon the life of the deceased, either then or subsequent thereto, until his death, there can be no doubt, I think, that the testator, at all events referred to the policy in question, and, having regard to the facts that there could be no question as to what policy he did refer to."

Probably the most important case along this line, decided by the Canadian courts, however, is the case of Arnold v. Dominion Trust Company, recently passed upon by the British Columbian courts, the case having arisen out of a rather peculiar state of facts, and a peculiarly worded will, and the amount of money involved being somewhat large.

The case in question arose out of the operations of the Dominion Trust Company, and the death of W. R. Arnold, the manager. Arnold carried a very heavy insurance—in fact, over $200.000 of insurance money was collected, while some of the companies resisted payment. Before his death Arnold made a will in the words and figures following:

"The first $75,000 collected on account of policies of life insurance I give to my wife," with other provisions in reference to disposal of the funds.

The British Columbia act relating to the matter is as follows:

In case a policy of insurance effected by a man on his life is expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or in case he has heretofore indorsed, or may hereafter indorse, or by any writing identifying the policy by its number or otherwise has made, or may hereafter make, a declaration that the policy is for the benefit of his wife, or his wife and children, or any of them, such policy shall inure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the intent so expressed or declared; and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable.

The question then was whether the will bequeathing the insurance money to the wife was "any writing" within the meaning of the act, and on this point the British Columbia court followed the Ontario decisions to the same effect.

Then this question was whether the will in question was a writing "identifying the policy by its number or otherwise," and the point was one of "first impression," as the lawyers say, as no case was exactly in point.

The judge who tried the case decided against the claim of the wife, on the ground that where there are several policies for a total amount exceeding the sum named in the will, a bequest of a certain smaller sum to be paid out of life insurance generally is not a sufficient "identification" of the policies.

In deciding the case the judge made the following general observations in reference to the insurance acts:

"The act was passed as a remedial measure and of assistance in effecting one of the principal benefits of life insurance. It was intended, notwithstanding the terms of the contract with the insurance company, that the assured could of his own volition vary the same and make provision for his dependents in case of death. It is limited in its operation to his wife and children. I think, under such circumstances, that the act should receive 'such fair, large and liberal construction and interpretation as will best insure the attainment of its object.' No decision has been cited to me on the point, in which the facts are on all fours with those presented in this case."

Notwithstanding the foregoing, the decision was against the widow, the judge relying strongly on an Ontario case, where the court refused to uphold a will bequeathing to a wife one of four policies (all of a similar description) without any further reference to any particular policy. In that case the Ontario judge had said:

"I should go far beyond any decision yet pronounced in favor of preferred beneficiaries upon the question of identification under the statute. In my opinion it is not possible to maintain that a bequest of one of four policies, any one of which may be selected to answer a bequest, is such a designation as meets the requirements of the statute—that the policy shall be identified by number or otherwise."

"It is admitted," concluded the British Columbia judge in the Arnold case, "that W. R. Arnold had a number of policies in force at the time when he made his will. The face of such policies exceeded $75,000 and it is thus doubtful, out of which policies he expected or intended such amount to be paid. It is thus contended that even if a will can by apt terms operate so as to comply with the act that the language of the will in question falls short of the identification contemplated and intended by the statute. He could easily have identified a particular policy in the will. He did not do so, however. Can the wife and children under the terms of the will obtain the benefit of the act without some such compliance? I think that while the intention of Arnold to appropriate the proceeds of insurance is quite clear, still, this is not sufficient; I should not, as a court of first instance, hold that the policies have been properly identified so as to comply with the statute. If I decided otherwise, I feel that I would be going farther than the decisions warrant. It was uncertain at the time when the will was made, or when Mrs. Arnold was informed as to the provisions of the will, as to what policy or policies would afford the moneys to pay the $75,000. This is still unascertained. There is not the 'clear, sure and certain identification which seems to be imperative, having regard to the repeated and particular expressions of the Insurance Act.'

"It is to be regretted that Arnold did not implement his intention of providing for his dependents out of his life insurance—in a legal manner. In my opinion, the statute permitting this course to be pursued for the benefit of wives and children has not been complied with. The moneys collected from the life insurance policies are not available for payment of the $75,000."

The case was appealed to the British Columbia Court of Appeal, and two judges held that the judge below was right; while two judges decided that the will was sufficient and that the widow was entitled to the $75,000 fund.

"To illustrate the point," said one of the judges who upheld the will, "if at the time of the present declaration in the will there were ten policies in existence, but all had since lapsed save one, there could then be no doubt about the identification whatever

—it would be a certainty. And if two only remained for $50,000 each, there would still be a certainty for both would have to be resorted to in order to complete the trust. So, in my opinion, there can be no real lack of identification where all are made liable to a contribution, wholly or in part, from which liability they may be freed by payments from one or more of the whole group charged. In such case there is from the outset the certainty that all are liable and none is discharged till payment of the whole specified amount is made to the beneficiary. Again, by illustration—if the insured had four policies in four different companies for $5,000, $10,000, $15,000 and $ ',000 respectively, they could be jointly charged for a whole sum of $25,000 just as effectually as they could be severally charged for a part thereof. And it is easy to imagine circumstances in which a careful and prudent policyholder would seek to guard against any failure of the intended trust by making a joint charge of $20,000 upon four policies aggregating $50,000, instead of a several charge of $5,000 upon each of them: as time goes by he may have reason to doubt the financial standing of one or more of them; or the forfeiture, or non-contestable, or other clauses might not be so favorable in all; or he might wish to guard against the consequence of any oversight in payment of premiums; or delay in payment by any company which might for a special reason wish to contest payment thereby causing expensive litigation as well as postponement of the intended benefit, which is almost invariably urgently needed. Therefore, I am of the opinion that the court should hesitate long before depriving his widow and children of the result of his foresight and business acumen in minimizing and distributing the risk of any failure of the intended trust by making a joint instead of a several charge. There is absolutely no distinction in principle and cases ought to be decided upon principle and not upon attempts to change principles to meet new and ever varying facts. I regard the words here employed—'the first $75,000 collected on account of policies of life insurance'—as equivalent to 'all my policies of life insurance,' for the testator was unquestionably speaking of his own insurance, and 'my policies' mean 'all my policies,' just as 'my goods and chattels' means 'all my goods and chattels,' unless further words of limitation are employed."

The following quotations from the judgment of the other judge will also repay a careful perusal:

"Turning to the precise matter we have for decision, it appears to me to be simple in the extreme. All the insurance of the testator is dealt with in the declaration as contained in the will; the fund is identified; the policies are all the policies upon the life of the testator that are dealt with in the writing. Is it difficult to identify or find these policies? It is highly unreasonable to so construe the statute law as to render it nugatory, void and of no effect, and ask for the number of the policies or other particular identification when the declaration, in its effect, covers all policies; that a portion of the moneys only are to go to the wife matters not, the whole might have been given, but, save as to the $75,000, the creditors of the estate are entitled to the moneys. When it is considered that it was the plain intention of the legislature to make provision, whereby the husband could, even as against his creditors, protect his wife and children from penury, it would be frittering away the benefit intended, to so construe the statute law as to render it almost impossible under certain conditions to obtain the benefit clearly intended by the legislature. It is not difficult to call into mind situations and circumstances when the husband would be unable to have the policies at hand, or would know the numbers thereof, or even remember the names of the companies; and can it for a moment be considered that the intention of the legislature was that the language used should in such a case, without this information available, render it impossible for the husband to comply with the statute? The answer must be, that the spirit and intention of the legislature was to enable the husband to make the declaration in any reasonable and rational way, and the language is 'by writing identifying the policy by its number or

otherwise has made or may hereafter make a declaration that the policy is for the benefit of his wife or of his wife and children.' "

The court being equally divided—two and two—Judge Macdonald's judgment against the widow was sustained, so that the decision will be good law in Canada, unless the case is carried to the Supreme Court of Canada and reversed on appeal.

M. L. HAYWARD.

Hartland, N. B., Canada.

BILLS AND NOTES—NEGOTIABILITY.

FIRST NAT. BANK OF SIDNEY v. GREENLEE.

166 N. W. 560.

Supreme Court of Nebraska. Feb. 16, 1918.

Where a promissory note contains the printed words "pay to the order of" immediately before the name of the payee, and the written word "only" immediately after the name of the payee, held, the written word "only" prevails over the printed words "pay to the order of," and such note is non-negotiable.

MORRISSEY, C. J. Plaintiff brought this action on a promissory note and recovered a judgment against appellant Greenlee as maker, and against defendant Closman as indorser. Greenlee appeals.

The petition alleges that, December 12, 1912, Closman executed and delivered to plaintiff his promissory note for the sum of $1,000, and, as collateral security therefor, indorsed and delivered the note in suit to plaintiff; that the Closman note and the note in suit were both due and unpaid. Judgment was entered against Closman by default. Defendant Greenlee answered, admitting the execution and delivery of the note by him to Closman, and alleged in substance that the note was nonnegotiable and that the consideration therefor had failed. The answer contains a number of allegations calculated to show the transaction between Greenlee and Closman, but their recital is unnecessary for a determination of this case. A jury was waived, and the cause tried to the court.

Defendant offered to introduce evidence to show the agreement between the maker and the payee of the note and their understanding of the paper. This evidence was excluded, and the rulings of the court are assigned as error. As the controlling question is the negotiability of the paper as it appears on its face, it is unnecessary to discuss rulings on the admission or exclusion of evidence. The note was written on a standard printed form and reads as follows:

"1,000.00. Sidney, Nebr., Dec. 9th, 1912.

"One year after date I promise to pay to the order of L. F. Closman only
one thousand & no/100 dollars
at Sidney, Nebr., with interest at eight per cent. per annum from date.
Value received. A. K. Greenlee."

The date line is written with a pen; the words "one year" and the personal pronoun "I" are written, in the second line, with a pen; "L. F. Closman only," on the third line, is written with a pen; "one thousand and no/100," in the fourth line, is written with a pen; "Sidney, Nebr., with interest at eight per cent. per annum from date," is written with a pen, as is also the signature "A. K. Greenlee." All other parts are printed, including the words "pay to the order of."

There is an apparent conflict between the printed words "pay to the order of," preceding the name of the payee, and the written word "only," following the name of the payee. Section 5335, Revised Statutes of 1913, provides:

"Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail."

To give full effect to this provision of the statute, the word "only," written with a pen, must be held to prevail over the printed words "pay to the order of." The negotiability of the instrument was restricted by the written word "only," and the plaintiff took the note subject to any defense the maker might have if it were in the hands of the original payee.

Appellant claims that under the pleadings and proof the judgment ought to be reversed and dismissed. We do not care to go so far as this. The negotiability of the note was somewhat clouded by the form of answer filed, and was not presented to the trial court, either by the answer or by the motion for a new trial, in the clear and concise language the question might have been presented. The answer may have misled the trial court, as well as attorneys for the plaintiff, and the admissions in the reply on which appellant now relies for a dismissal of the case may have been inserted because of the peculiar form of

the answer. The indorsement and delivery of the note by Closman to plaintiff constituted an assignment thereof to plaintiff. As to appellant Greenlee the judgment is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

LETTON, J. (concurring). Without reference to the point discussed in the opinion, in my judgment, the note is nonnegotiable on its face.

ROSE and SEDGWICK, JJ., not participating.

HAMER, J. (dissenting). The note about which the controversy arose is made payable "to the order of L. F. Closman only." As the note is written, it appears to me to be a negotiable instrument. The insertion of the word "only" did not, so far as I can see, change the character of the instrument, so that it became nonnegotiable. When the officer of the bank looked at it, he would see that it permitted Closman to indorse it. Whether the note read "to pay to the order of L. F. Closman only," or read "to pay to the order of L. F. Closman," made no difference. In any event, Closman could indorse the note, and thereby transfer it. I am not prepared to say that the writing of the word "only" might not have attracted the attention of the officer of the bank who received it, but I most strenuously insist that a note payable to the order of any payee named in the instrument is transferable only by the indorsement of such payee.

Section 5348, Rev. St. 1913, provides the qualities which make an instrument negotiable. The first sentence of the section reads:

"An instrument is negotiable when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof."

No good reason is given why this note may not be transferred from one person to another, so as to constitute the transferee the holder. The closing sentence in the section reads:

"If payable to order it is negotiated by the indorsement of the holder completed by delivery."

It was "payable to order." It was indorsed by the holder, and the title to the the bank appears to have been made complete "by delivery." It is difficult for me to understand why we should shut our eyes to the fact that the note was made "payable to order." Putting the word "only" in the note did not take away the words "payable to order." Only the payee of the note could properly indorse it. Calling him by name would not seem to have made any change in the intention of the maker.

NOTE.—*Restrictive Words Destroying Negotiability.*—The prevailing opinion in the instant case puts the question of negotiability on a fact of no importance or at least of very little importance. It assumes opposition between printed and written words and then holds that the written words restrain negotiability. The dissent appears not particularly to care whether the instrument was wholly written or wholly printed and construes it according to its alleged obvious meaning. If there were irreconcilable conflict in the words, so as to bring about an ambiguity, we think it might be said it would put a proposed purchaser on inquiry. We can only hope to cite analogous cases.

The general rule is that "courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper." And "they are careful to guard against fraud" where there is bad faith or with knowledge actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint." Ward v. City Trust Co., 192 N. Y. 61, 72, 84 N. E. 585. This states the rule, that whatever is on the face of a bill or check does not prevent negotiability unless it creates a well-defined suspicion that calls for investigation.

It is said that this rule at common law is strongly enforced in Negotiable Instruments Law. There must be "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounts to bad faith."

"Mere ground of suspicion as to possible defects in the title of the negotiator, or of the existence of defenses to the instrument negotiated, is not the equivalent of notice to the transferee, and, to be regarded as an innocent purchaser, he need not as a matter of law be diligent to investigate the circumstances of the origin of the paper, though, if the negligence be of a marked or gross character, it may be competent to establish the *mala fides* of the purchase." Arnd v. Aylesworth, 145 Iowa, 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638.

Where a check is postdated this has been held not sufficient to put one on inquiry. Mayer v. Mode, 14 Hun. 155. Nor where a check was made at St. Paul, Minn., and cashed five days later at Denver, Colo. Estes v. Lovering Shoe Co., 59 Minn. 504, 61 N. W. 674, 50 Am. St. Rep. 424. Where a note had no stamp on it as required by law this has been held not to put purchaser on inquiry. Ebert v. Gitt, 95 Md. 186, 52 Atl. 900. Where there was variation in numerals and words as to amount of note are said to be not infrequent and give rise to no reason for inquiry. Central Nat. Bank v. Pipkin, 66 Mo. App. 592. The erasing of an indorsement on the back of a certificate of deposit gave no reason for inquiry, because an indorser in lawful possession may erase all indorsements to him. Bank of Montreal v. Dewar, 6 Ill. App. 294.

Where the word "renewal" was erased, an instruction that "if there was any mark of 'renewal' the plaintiff was put on inquiry," was held erroneous. Hall v. Hale, 8 Conn. 336.

"Without recourse" indorsed on a note presents no occasion for inquiry. Stevenson v. O'Neal, 71 Ill. 314; Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697. And where "without recourse"

had been erased, and the indorsement left unconditional, this was insufficient to put a purchaser on inquiry. Collins v. McDowell, 65 Minn. 110, 67 N. W. 845.

In Richards v. Monroe, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301, it was declared not to be the rule in Iowa that a purchaser of a negotiable promissory note for value is not upon inquiry where he has such knowledge or information of infirmities as would put a man of ordinary prudence upon inquiry. Putting him on suspicion is not sufficient. "He must be shown by direct or circumstantial evidence" to have taken with actual knowledge or that there was wilful neglect to inquire. Lehman v. Press, 106 Iowa 389, 76 N. W. 818.

Mere suspicion that a note is without consideration will not defeat recovery by holder. There must be bad faith. Borgess Invest. Co. v. Vette, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567. Bad faith is the rule in Nebraska also. First State Bank v. Borchers, 83 Neb. 530, 120 N. W. 142.

Where a note is payable "to the order of Lew W. Cochran or R. F. Dygert" is negotiable upon indorser of the one of the two having it in his possession, where there is no bad faith. Voris v. Schoonover, 91 Kan. 530, 138 Pac. 607, 50 L. R. A. (N. S.) 1097.

A premium note payable to an insurance company or their treasurer is a good note and action may be maintained by the company. Atlantic M. F. Ins. Co. v. Young, 38 N. H. 451, 75 Am. Dec. 200.

In Watson v. Evans, 1 Hurlst. etc., 662, 32 L. J. Exch. N. S. 137, a note payable to A, B and C or their order or the major part of them may be sued on by all of them.

These cases show the general theory of cases where there are irregularities or departures from ordinary phraseology in negotiable paper. Commercial usage will not permit a signer of a paper presumptively intended for transfer, in a way whereby innocent purchasers may be defrauded, without putting upon him the onus of answering for his own negligence, unless the irregularity suggests plainly some infirmity. It would be too plain for argument that were the paper in the instant case, wholly written, it would mean what it plainly imports or it would demonstrate negligence by the maker. It is too slight a circumstance to say, that because the unusual word was in writing it eliminates wholly what is printed.

C.

BOOKS RECEIVED.

The Law of Bills, Notes and Checks. Being the full text of the Negotiable Instruments Law as adopted by forty-four states, the District of Columbia and Hawaii; with copious annotations, forms and illustrations. By James L. Whitley of the New York Bar, former Assistant Corporation Counsel of City of Rochester, Member of Committee on Banks, New York State Legislature and author of Police Officers' Law. Rochester, N. Y. National Law Book Company. 1917. Price, $4.00. Review will follow.

HUMOR OF THE LAW.

Down in the Kentucky Purchase they had an old fellow on the witness stand and the attorney said to him, "Well, Mr. Smith, you know where Mr. Brown lives?" "Oh, yes, very well." "How far is it from the place where this trouble occurred up to Mr. Brown's house?" "Well, if you go straight through the fields it is not more than a quarter of a mile but if you go around the preambles of the road it is a mile and half."

Senator Lodge was talking about certain investigating committees. "Some of them, he observed, "remind me of Si Hoskins. Si got a job at shooting muskrats, for muskrats overrun a millowner's dam. There in the lovely spring weather, Si sat on the grassy bank, his gun on his knee. Finding him one morning, I said:

"'What are you doing, Si?'

"'I'm paid to shoot muskrats, sir,' he said. 'They're underminin' the dam.'

"'There goes one now,' said I. 'Shoot, man! Why don't you shoot?'

"Si puffed a tranquil cloud from his pipe and said:

"'Do you think I want to lose my job?'"—Chicago Herald.

"You say, madam" said the lawyer to a woman in the witness box, "that the defendant is a sort of relation of yours. Will you please explain what you mean by that—just how you are related to the defendant?"

"Well, it's just like this. His first wife's cousin and my second husband's first wife's aunt married brothers, named Jones, and they were own cousins to my mother's own aunt. Then, again, his grandfathers on my mother's side were second cousins, and his stepmother married my husband's stepfather after his father and my mother died, and his brother Joe and my husband's brother, Henry married twin sisters. I ain't never figured out just how close related we are, but I've always looked on 'im as a sort of cousin."

WEEKLY DIGEST

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1. **Assault and Battery**—Accidental Collision.—Where collision between defendant's automobile and that in which injured party was riding was an accident brought about by defendant's negligence and without intent to commit an assault, there could be no conviction under statute defining assault and battery.—Coffey v. State, Tex., 200 S. W. 384.

2.——Injury to Social Position.—In action for alleged unprovoked assault, the measure of damages was the injury, pain and suffering, expenses for medical care and treatment, and loss of time, if any, and the jury should not have been permitted to consider injuries to professional standing, social position, or good repute, especially in the absence of evidence of such injuries.—Guterson v. Jensen, Wash., 170 Pac. 352.

3. **Assignments**—Receivership.—Where a corporation has contracted to buy a large amount of iron ore, and becomes insolvent, and cannot handle it, and receivers are appointed, a contract by the receivers with another to take the ore as delivered and dispose of it for benefit of creditors, held not an assignment of a cause of action for a prior breach of the seller in refusing to deliver.—Hanna v. Florence Iron Co. of Wisconsin, N. Y., 118 N. E. 629.

4. **Attorney and Client**—Relationship.—Attorney for receiver in mortgage foreclosure does not violate his obligations by purchasing the certificate of sale and obtaining a deed thereon. Kock v. Burgess, Ia., 166 N. W. 275.

5. **Bailment**—Conditional Sale.—Despite Rem. Code 1915, § 1156, where plaintiff was not in possession, lien for work done on motor car at instance of seller held superior to rights of plaintiff who purchased under conditional sale contract, though contract was made and recorded before work was done.—Barbour v. Hodge, Wash., 170 Pac. 115.

6.——Lien for Repairs.—Under Acts 1903, p. 260, § 1, one engaged in repairing automobiles and furnishing materials therefor was entitled to lien for repairs made for conditional buyer of automobile.—Weber Implement & Automobile Co. v. Pearson, Ark., 200 S. W. 273.

7. **Bankruptcy**—Corporation.—A corporation may file a voluntary petition in bankruptcy.—In re S. & S. Mfg. & Sales Co., U. S. D. C., 246 Fed. 1005.

8.——Preference.—That husband transferred to his wife property recorded in his name within four months of bankruptcy made transfer presumptively fraudulent as to existing creditors in view of Civ. Code, § 3442.—Phillips v. Huffaker, Cal., 170 Pac. 431.

9.——Proof of Claim.—Under Bankruptcy Act July 1, 1898, § 57, final judgment in state court against bankrupt, which had been discharged, establishing amount of debt or claim, should be framed in such limited form as not to involve judgment in personam, but adequate to enable creditor to reap benefit of proof of claim.—Barry v. New York Holding & Construction Co., Mass., 118 N. E. 639.

10. **Banks and Banking** — Assumption of Debt.—Where assets of embarrassed state bank had been transferred to defendant in consideration of its assumption of its liability, contract between defendant and directorate of such bank held inadmissible to affect rights of creditors.—Citizens' Nat. Bank of Stamford, Tex., v. Pigg, U. S. C. C. A., 246 Fed. 902.

11.——Distribution of Corporate Assets.—Where stockholders of banking corporation have illegally withdrawn and distributed its assets among themselves, its receiver may maintain action to compel them to refund to him on bank's behalf sufficient funds to satisfy valid judgment against it.—Weil v. Defenbach, Idaho, 170 Pac. 103.

12. **Bills and Notes**—Consideration.—Notes executed and delivered to bank for money used by makers to save a third person's land from sale under execution, and in return for his old note, were supported by consideration.—Farmers' State Bank of Greentop v. Sloop, Mo., 200 S. W. 304.

13.——Fictitious Person.—Where note for stock was made payable to W. E. D. & Co., and was indorsed by W. E. D. in the name W. E. D. & Co., in which name he did business, it was not payable to a "fictitious person," within L. O. L., § 5842, providing that a note is payable to bearer when it is payable to a fictitious or

non-existing person, and that fact is known to the person making it so payable, though the stock was not owned by W. E. D. & Co.—Hill v. McCrow, Ore., 170 Pac. 306.

14.——General Demurrer.—In action on note given for agency of a churn, defendant's averment that the churn was wholly incapable of doing the work that the payees represented to him that it would do, and was of no use, and unsalable, is very general, but is sufficient against a general demurrer.—Lang v. Bohlen, Tex., 200 S. W. 429.

15. **Bridges**—Warranty.—Plan showing supposed position of bedrock furnished by New York City to its bidders and contractor to construct foundations of tower of bridge held such a representation or warranty as to position of bedrock as to bind city and render it liable for additional costs to contractor caused by mistake.—Faber v. City of New York, N. Y., 118 N. E. 609, 222 N. Y. 255.

16. **Brokers**—Contract.—Where president of corporation engaged in manufacture of explosives, after having conducted negotiations with prospective purchaser, turned matter over to plaintiffs, who were acting for corporations as brokers in other matters, with directions that they should conclude contract, plaintiffs were not, as to such purchaser, acting as brokers.—Bassick v. Aetna Explosives Co., U. S. D. C., 246 Fed. 974.

17.——Marketable Title.—Answer of one sued for commission by one furnishing a buyer that the buyer was not ready, able and willing, put in issue the merchantability of title of certain property the buyer was to apply on the purchase price.—Thomas v. Long, Ia., 166 N. W. 287.

18. **Cancellation of Instruments**—Equity. — Where it appears inferentially that defendant was holding land as a guardian when she fraudulently prevailed upon plaintiffs to sell to her at an inadequate price, a complaint was not demurrable as not calling for equitable jurisdiction, although the court might not be able to grant the specific relief prayed for.—Marshall v. Gustin, Ore., 170 Pac. 312.

19. **Carriers of Goods**—Unloading.—Where a carrier unloaded a cargo 48 hours before fire burned the dock, destroying shipper's goods, which it had so covered with others that shipper could not remove them, the relation of shipper and carrier still obtained, and carrier was liable.—Lagomarsino v. Pacific Alaska Nav. Co., Wash., 170 Pac. 368.

20. **Carriers of Live Stock**—Stockyards.—Carrier of live stock owes no duty to local buyer or seller of stock, as to installation of stockyards scale for his convenience, until stock is tendered for shipment.—Cahill & Redman v. Great Northern Ry. Co., S. D., 166 N. W. 306.

21. **Carriers of Passengers**—Act Constituting Relation.—One who purchases a ticket at 11 a. m. for a train leaving at 6 p. m., who intends to stay in the station to keep warm, is not a passenger, and may be ejected.—Thomas v. Bush, Mo., 200 S. W. 301.

22.——Redemption of Unused Tickets.—Under Code Supp. 1913, § 2128a, requiring railroads to redeem unused tickets, railroad can reasonably require ticket holders to surrender their tickets and submit written statement as to why the ticket was not used, to be sent to general passenger agent for redemption.—Prichard v. Chicago & N. W. Ry. Co., Ia., 166 N. W. 299.

23.——Negligence.—Where a conductor rings to go on while in the front of a street car without looking back to see if anyone was rising to get off, he is negligent.—Poak v. Pacific Electric Ry. Co., Cal., 170 Pac. 159.

24. **Champerty and Maintenance**—Alienation. —Where minor Cherokee freedman attempted to convey part of his allotted land, and, after majority, conveyed by warranty deed to another, validity of latter conveyance was not affected by champerty statute, Rev. Laws 1910, § 2260, as alienation was controlled by congressional enactment.—Nivens v. Adams, Okla., 170 Pac. 473.

25. **Chattel Mortgages**—After-Acquired Property.—Mortgage on chattels to be afterwards acquired is valid between parties and as to all others having notice, which notice may be given to creditors of mortgagor and subsequent purchasers as prescribed by Rev. Codes, § 3408.—Dover Lumber Co. v. Case, Idaho, 170 Pac. 108.

26.——Description of Property.—Description of cattle mortgaged by giving the number, their location by section, township and range, and the names of persons from whom they were purchased and the number purchased from each, is sufficient as between the parties to the mortgage.—Theodore Hamm Brewing Co. v. Flagstad, Ia., 166 N. W. 289.

27.——Irregular Foreclosure.—Under chattel mortgage providing for public or private sale with or without notice at any convenient place in county where chattels are situated, sale outside of county is an irregular foreclosure.—National Bank of Commerce of Porum v. Jackson, Okla., 170 Pac. 474.

28. **Commerce**—Employe. — Whether section foreman on track used in interstate commerce was employed therein when injured would depend on work he was actually engaged in when injured, regardless of whether he accomplished such work.—Atlantic Coast Line R. Co. v. Tomlinson, Ga., 94 S. E. 909.

29.——Interstate Transaction.—Contract for sending telegrams from one state to another is one involving interstate commerce, and, so governed by the federal law, not allowing damages for mental anguish.—Hall v. Western Union Telegraph Co., S. C., 94 S. E. 870.

30. **Conspiracy**—Co-Conspirators.—Party who took active part in consummating exchange of land, and corroborated false representations, previosuly made, held a conspirator if conspiracy in fact existed, though not connected with deal until after original contract of exchange was made.—Wolfgram v. Dill, S. D., 166 N. W. 309.

31. **Contracts**—Restraint of Trade.—Contract by lessor not to engage in poultry business for five-year term of lease within radius of 15 miles is not void; territory embraced not being so extensive as to make contract against public policy.—Boone v. Burnham & Dallas, Ky., 200 S. W. 315.

32. **Corporations**—Guarantor.—Brewing corporation can legally guarantee performance of any condition in lease to saloon keeper who

stipulates exclusively to sell such corporation's beer.—Depot Realty Syndicate v. Enterprise Brewing Co., Ore., 170 Pac. 294.

33.——Tender.—Tender of stock bought on agreement that it might be returned at buyer's option at certain figure, and demand that defendant perform his contract was seasonably made, though not on precise date named in contract; time not being of the essence.—Matson v. Bauman, Minn., 166 N. W. 343.

34. **Damages**—Impairment of Sight.—In action for personal injuries, though not entitled to recover for slight impairment as direct injury because not alleged, plaintiff could recover for brain laceration, such injury having been alleged, and to prove it could introduce evidence of impairment of sight.—Chesapeake & O. Ry. Co. of Indiana v. Perry, Ind., 118 N. E. 548.

35.——Mitigation of.—Where, pursuant to contract for purchase of skimmed milk, defendants installed vats in plaintiff's creamery to receive it and employed cheese maker to manufacture it, and thereafter notified plaintiff that they would no longer comply with contract, plaintiff could not, without making some effort to reduce loss, permit milk to become total loss and then hold defendants liable for contract price.—Fulton v. Canno, N. Y., 118 N. E. 633, 222 N. Y. 189.

36. **Deeds**—Inadequate Consideration. — Improvident conveyance of property without receiving any valuable consideration therefor, or for grossly inadequate consideration by weak, aged, or infirm person amounts to constructive fraud, and equity will intervene to compel restoration.—Keller v. Cox, Ind., 118 N. E. 543.

37. **Disorderly House** — Common Bawdy House.—That on a single occasion there was a gathering of lewd men and women at a house for lewd purposes did not constitute it a "common bawdy house."—State v. Seba, Mo., 200 S. W. 300.

38. **Divorce**—Custody of Child.—Where a husband and wife were divorced, and the mother was given the custody of a child, an attempt by her to give her child to her parents by will does not constitute any right to the child's custody as against the surviving father.—Rallihan v. Motschmann, Ky., 200 S. W. 358.

39. **Eminent Domain** — Public Use.—That lands are taken for use pursuant to general project involving creation of new municipal highways, the removal of railroad and trolley terminals so as to connect sections of university campus does not deprive improvement of its public character.—Rowland v. Mercer County Traction Co., N. J., 102 Atl. 814.

40.——Public Use.—The use of water for irrigation of lands by private persons constitutes a "public use" and in aid thereof the lands of another may be condemned for ditch purposes. —Young v. Dugger, N. M., 170 Pac. 61.

41. **Estoppel**—Record of Assignment.—Estate of purchaser of bond and mortgages which, with the assignment, were left with attorney who did not record assignment and through forged or fictitious assignments obtained a loan on the mortgages, held not estopped to set up its rights.—Sterling Leather Works v. Liberty Trust Co., N. J., 102 Atl. 841.

42.——Evidence.—Where claimant when asked by decedent when drawing his will, how much he owed her, answered that he owed nothing, and had paid, and he thereupon gave her a small bequest, held, that she was estopped to assert claim for board and care.—Davis v. Smock's Estate, Wisc., 166 N. W. 311.

43. **Exchange of Property**—Presumption.—Where one speaks of exchanging for a "building," it may be assumed that he referred as well to the land on which it stood.—Thomas v. Long, Ia., 166 N. W. 287.

44. **Food**—Misbranding.—On a trial for shipping oil, misbranded, in that it was offered for sale as lemon oil, of which it was an imitation, evidence that defendant's salesman represented that it was pure lemon oil held admissible.—Weeks v. United State, U. S. S. C., 38 Sup. Ct. 219.

45. **Fraud**—Presumption.—When it appears that parties occupied unequal positions, and that one occupying superior position has gained a substantial advantage, there is a presumption of fraud or unconscionable dealing which makes out a prima facie case, unless overcome by proof.—McCowen, Probst, Menaugh Co. v. Short, Ind., 118 N. E. 538.

46.——Willfulness.—The word "willfully," as used in Rev. Laws 1910, § 993, providing that "one who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers," implies not only knowledge of the thing, but a determination with an evil intent to do it or omit doing it.—Citizens' State Bank of Okeene v. Cressler, Okla., 170 Pac. 230.

47. **Guaranty**—Failure of Consideration. — Where bond guaranteeing loans and discounts to corporations from bank is signed by surety on consideration that bank shall make such loans and discounts in consideration of execution and delivery of agreement, unless loans or discounts are made on faith of bond, consideration for surety's promise fails.—Utica City Nat. Bank v. Gunn, N. Y., 118 N. E. 607, 222 N. Y. 204.

48. **Habeas Corpus**—Custody of Child.—In controversies over custody of children there is very strong presumption as to right and fitness of surviving parent, and fact that circumstances required that father at birth of child and death of the mother surrender it to his wife's sister, who kept it for three years, is not conclusive against him.—Winter v. Winter, Ia., 166 N. W. 274.

49. **Highways**—Law of Road.—Where plaintiff's automobile while stopped on left of center of road was struck by defendant's automobile going in same direction, defendant could not be held guilty of contributory negligence; Civ. Code 1912, § 2157, requiring driver to keep to the right.—Smoak v. Martin, S. C., 94 S. E. 869.

50.——Negligence.—That defendant constructing transmission lines for carrying electricity had franchise to occupy highway gave it no right to negligently expose traveling public to dangers of unguarded hole dug in constructing its line.—Indiana Utilities Co. v. Wareham, Ind., 118 N. E. 572.

51. **Injunction**—Quo Warranto.—Injunction to restrain persons from acting as directors of private corporation for having been irregularly

elected, are not proper in absence of special legislation, since quo warranto affords adequate and appropriate remedy.—Grant v. Elder, Colo., 170 Pac. 198.

52. **Insurance**—Estoppel.—That insured paid increased assessments for four years did not constitute ratification, of estopping beneficiary from claiming that assessments were illegal.—Supreme Council, Catholic Knights of America, v. Wathen, Ky., 200 S. W. 320.

53.——False Representation.—Inquiries in application for life insurance as to whether applicant had ever used liquor, and in what quantities presently and in past, inhered in report of insurer's medical examiner, so that false answers as to past use, in absence of fraud on examiner, were no defense to insurer, under Code, § 1812.—Boulting v. New York Life Ins. Co., Ia., 166 N. W. 278.

54.——Fidelity Contract.—Under bond guaranteeing national banking association against losses from defalcations, etc., of employes, held that surety was liable for losses of association in honoring checks drawn by employe on his account, where it did so relying on his representations that check drawn on another bank which he deposited to his credit was good, when in fact it was worthless.—Maryland Casualty Co. v. First Nat. Bank of Montgomery, Ala., U. S. C. C. A., 246 Fed. 892.

55.——Theft.—Under policy covering loss from theft from fireproof safe by persons entering safe by tools or explosives, opening of inner doors by explosives was "entry into the safe" by explosives, and it was immaterial that outer door had not been so opened.—T. J. Brunner Co. v. Fidelity & Casualty Co. of New York, Neb., 166 N. W. 242.

56.——Unearned Premium. — Where insurer has elected to treat a policy of insurance as void for breach of condition providing for a forfeiture, the assured has no claim upon it for any unearned premium.—Meyers v. German Fire Ins. Co., Neb., 166 N. W. 247.

57. **Landlord and Tenant**—Eviction.—In an action of unlawful detainer under a clause in a lease that the landlord could evict lessee if he ran his business so as to create a nuisance and arouse criticism among the other tenants, evidance as to reputation of the place was admissible.—W. B. Hutchinson Inv. Co. v. Van Nostern, Wash., 170 Pac. 121.

58. **Libel and Slander**—Innuendo.—To state of another "he has robbed me of hundreds of dollars" does not impute robbery as defined by Rev. St. 1909, § 4530, and is actionable only in connection with an innuendo setting forth the meaning intended.—State ex rel. Harriman v. Reynolds, Mo., 200 S. W. 296.

59. **Licenses**—Classification.—It was not improper classification to provide in one ordinance for the licensing of jitneys operating over particular routes, and in another ordinance for the licensing of service cars confined to no particular route.—Ex parte Parr, Tex., 200 S. W. 404.

60.——Delegation of Power.—Unless it can be shown that work of laying concrete sidewalks affects public health, morals, safety, or welfare, state would have no power to restrict or prohibit it, and no power to delegate such power to municipality.—State v. City of Sheridan, Wyo., 170 Pac. 1.

61. **Livery Stable and Garage Keepers**—Garage Defined.—Garage is a place for the care and storage of motor vehicles, and in which they are kept for hire, and a livery stable is a place where horses are groomed, fed and hired, and vehicles kept for hire.—Grimes v. State, Tex., 200 S. W. 378.

62. **Mandamus**—Election Inspectors. — Mandamus will not lie to correct errors in return of election inspectors, unless they appear upon return or upon tally sheet, as court has no power in such proceeding to open ballot box or direct recount.—People ex rel. Fiske v. Bantz, N. Y., 168 N. Y. S. 965.

63. **Master and Servant**—Course of Employment.—Where servant of tinner while riding in master's wagon to place a job was being done, got out while the horse was being watered, and was killed while crossing street to buy tobacco, the accident did not arise out of his employment within the Workmen's Compensation Act.—In re Betts, Ind., 118 N. E. 551.

64.——Hazardous Work. — County employe killed by lightning while working on steel grader held not within Workmen's Compensation Act, § 16, such work not being extra-hazardous. — Wiggins v. Industrial Accident Board, Mont., 170 Pac. 9.

65.——Independent Contractor.—Where, at request of sawmill's independent contractor to manufacture lath, on promise of more money, mill's employe left and went to work in lath mill, no legal duty rested on sawmill, when its employe changed, to inform him of situation that operator of lath mill was independent contractor.—Raftis v. McCloud River Lumber Co., Cal., 170 Pac. 176.

66.——Safe Place to Work.—Where employe was sent into tank which was being repaired, to fasten loose brace rods and fell when he stood on a loose brace rod, held that there was no negligent failure to furnish a safe place to work.—Riback v. Chicago, St. P., M. & O. Ry. Co., Ia., 166 N. W. 292.

67.——Venue.—Under Workmen's Compensation Act, § 67, providing penalty for master's failure to make required reports of accidents to employes and mail them to the Industrial Board, the offense occurs in the county of the employer's business, and the venue of the action for the penalty is in that county.—In re Burk, Ind., 118 N. E. 540.

68.——War Conditions.—In view of pendency of war, casting great burdens on transportation system, held that it cannot as matter of law be declared that crews of engines used to push trains over grades were kept on duty more than 16 consecutive hours, in violation of Hours of Service Act, § 2, where at end of trips they were given rest periods, during which they were relieved of all duties.—Pennsylvania R. Co. v. United States, U. S. C. C. A., 246 Fed. 881.

69. **Mechanic's Liens**—Contract. — Where a contractor entered into two contracts filed on different dates for different parts of same work, a bond of surety company purporting to cover a single contract filed on one of the dates, reciting a consideration equal to the sum of the two, covers both contracts.—Hollenbeck-Bush Planing Mill Co. v. Amweg, Cal., 170 Pac. 148.

70.——Statutory Compliance.—Lien Law, § 15, held sufficiently complied with by filing assignment of moneys due under contract to build passenger station where it contained statement of substance of contract assigned; it not being necessary that contract and assignment be filed on separate papers.—American Hardware Corp. of New York v. Lyttle, N. Y., 118 N. E. 604, 222 N. Y. 201.

71. **Mines and Minerals**—Mineral Land.—Land valuable for coal is "mineral land" within the meaning of the public land laws.—United States v. Sweet, U. S. S. C., 38 Sup. Ct. 193.

72. **Mortgages**—Parties to Action.—Where under trust deed trustee sold more parcels of land than was necessary and applied proceeds to trust deeds not yet in default, fact that debt for which the sale was made was paid out of money received from parcels illegally sold, when there was sufficient money from land first sold, did not make such creditor a necessary party to set aside the unnecessary sales.—Smith v. Woodward, Va., 94 S. E. 916.

73. **Municipal Corporations**—Estoppel. — One charged with operating an automobile for hire without a license in violation of an ordinance was in no position to question the validity of the ordinance by reason of the authority therein given to revoke the license.—Ex parte Parr, Tex., 200 S. W. 404.

74.——Evidence.—In a personal injury action against a city, plaintiff need not plead the absence of light at a crossing as negligence in order that it may be considered as bearing on

the question of contributory negligence.—Birkhimer v. City of Sedalia, Mo., 200 S. W. 298.

75.——Franchise.—A state may ratify franchise granted by municipality without authority which excepted grantee of franchise from exercise of state's police power of regulation.—Winfield v. Public Service Commission of Indiana, Ind., 118 N. E. 531.

76.——Joy Riding.—When two or more persons engaged in joy riding upon alleged defective street at a dangerously high rate of speed, they assumed risk of danger not only from violent movement of the car, but from the inability of the driver to avoid accident.—Winston's Adm'r v. City of Henderson, Ky., 200 S. W. 330.

77.——Pollution of Water.—It is no defense to action against a city for pollution of water course that others than defendant contributed to cause the nuisance, as there can be no contribution between joint wrongdoers.—Orton v. Virginia Carolina Chemical Co., La., 77 So. 632.

78. **Nuisance**—Similar Business.—Where business, etc., is of such a character that, standing alone, it would be a nuisance, fact that other nuisances existed in same locality, producing similar damage, would be no defense.—Orton v. Virginia Carolina Chemical Co., La., 77 So. 632.

79. **Officers**—Appointive and Elective.—General rule is that in absence of special provision to contrary, resignation shall be tendered, in case of appointive officer, to person or body having power to appoint successor, and, in case of elective officer, to officer or body having power to order new election.—In re Opinion to the Governor, R. I., 102 Atl. 802.

80. **Railroads**—Acceptance of Charter.—Acceptance of charter granting railroad company right to locate railroad not exceeding named width, followed by its occupation for railroad purposes for part of named width, does not create presumption railroad company laid out its road over entire width.—New York, N. H. & H. R. Co. v. Armstrong, Conn., 102 Atl. 791.

81.——Proximate Cause.—If plaintiff's failure to stop his automobile did not proximately contribute to collision at point where street crossed defendant's railroad, it would not bar recovery.—Chicago, I. & S. A. Co, v. Nelzgodski, Ind., 118 N. E. 559.

82. **Receiving Stolen Goods**—Guilty Knowledge.—Proof of "facts and circumstances" showing that defendant "ought to have known" that property he bought was stolen, is sufficient proof of guilty knowledge on prosecution under St. 1917, § 4417, for knowingly receiving stolen property.—State v. Jacobs, Wisc., 166 N. W. 324.

83. **Release**—Construction of.—Release executed to city of New York by contractor to construct foundations for bridge which referred only to claims for work done under contract was no defense to city against contractor's claim for damages for breach.—Faber v. City of New York, N. Y., 118 N. E. 609, 222 N. Y. 255.

84.——Misrepresentation.—Contract of settlement of a cause of action procured by a misrepresentation of a material fact, though innocently made, may be rescinded by one relying upon it.—Smith v. Great Northern Ry. Co., Minn., 166 N. W. 350.

85. **Removal of Causes**—Diversity of Citizenship.—Where it appears that defendant, as to whom diversity of citizenship does not exist as a cause for removal, was employe of his co-defendant, that his liability is predicated on nonfeasance rather than misfeasance or malfeasance is not material.—Sumey v. Craig Mountain Lumber Co., Idaho, 170 Pac. 112.

86. **Parent and Child**—Agency.—There is no presumption that a minor child is the agent of the father in driving the latter's car, or that when driving such car he is acting within the scope of his authority.—Hays v. Hogan, Mo., 200 S. W. 286.

87. **Physicians and Surgeons**—Negligence.—Charge against physician of negligence in choice of method of treatment is refuted by showing respectable minority of expert physicians appproved of method selected.—Swanson v. Hood, Wash., 170 Pac. 135.

88. **Sales**—Description of Property.—A bill of sale describing property, "as described in deed from W. to T.," etc., sufficiently described the property.—Trabue v. Ash, Tex., 200 S. W. 415.

89.——Warranty.—One contracting to sell sheep, and agreeing that the sheep so offered shall be o fbetter quality than certain sheep exhibited, and that lambs shall weigh between 60 and 70 ponds, where inspection is not available, warrants the truth of such agreement.—Walters v. Ditto, N. M., 170 Pac. 47.

90. **Specific Performance**—Honest Mistake.—Testamentary trustee, vendor of lot, will not be compelled to convey for price agreed upon; it appearing clearly that trustee was honestly mistaken as to frontage or area of land in fixing price, based on its having frontage or area less than it really has.—Coppage v. Equitable Guarantee & Trust Co., Del., 102 Atl. 788.

91. **Statutes**—Ambiguities. — State's police power will not be presumed to have been abandoned by state's grant of charters and franchises to public service corporations, and in case of ambiguity all doubt must be resolved against abandonment of such powers.—Winfield v. Public Service Commission of Indiana, Ind., 118 N. E. 531.

92. **Sunday**—Transactions on. — Pen. Code 1911, art. 303, excepting from prohibition of Article 302 against transactions on Sunday, keepers of livery stables and certain other establishments, held not to except dealer in automobile supplies under rule of ejusdem generis.—Grimes v. State, Tex., 200 S. W. 378.

93. **Telegraphs and Telephones**—Change in Service.—Dismantling of direct telephone line is not objectionable change in service, within Gen. St. 1915, § 8341, where company has established another indirect line efficiently handling all business without detriment to public or individuals.—State v. Southwestern Bell Telephone Co., Kan., 170 Pac. 26.

94. **Vendor and Purchaser**—Evidence.—On issue whether farm on which plaintiff had paid part of price was as good as any farm in county, evidence as to character of the subsoil and farm's market value was admissible.—Nelson v. Berkner, Minn., 166 N. W. 347.

95.——Front Foot.—Sale of lot was none the less in effect sale by front foot, though seller, after fixing price as based on price per foot, result being $5,025, reduced it to even $5,000.—Coppage v. Equitable Guarantee & Trust Co., Del., 102 Atl. 788.

96.——Marketable Title.—In an agreement to convey good title, the words "good title" mean nothing less than an estate in fee or a marketable title, which can again be sold to a reasonable purchaser.—Upton v. Smith, Iowa, 166 N. W. 268.

97.——Rescission.—Where officer of vendor corporation went with plaintiff's agent and pointed out certain land as included in the tract to be sold, and such representation induced the sale and was relied on, when such land was not included, the purchaser could rescind.—Jackman v. Northwestern Trust Co., Ore., 170 Pac. 304.

98. **Wills**—Extrinsic Documents. — Where testator directed that trust funds be paid as his wife's will might direct, and that he should be deemed to have pre-deceased her if order of death was unknown, as was the fact, and wife made a will reciting power and giving property affected thereby, giving effect to testator's intent, did not violate rule against enlarging wills by reference to extrinsic documents.—In re Fowles' Will, N. Y., 118 N. E. 611, 222 N. Y. 222.

99.——Postponed Enjoyment. — Provision "This deed to take effect immediately on the death of both grantors herein," following granting clause in warranty deed, held not to postpone passing of interest, but merely enjoyment—Shaull v. Shaull, Iowa, 166 N. W. 301.

100.——Testamentary Character.—An instrument describing itself as a "will testament," undertaking to "will" part of property to signer's sons and remainder to widow, who was named administratrix, acknowledged and recorded, but not witnessed, was testamentary in character and not a conveyance.—Coburn v. Simpson, Kan., 170 Pac. 383.